No. 89-1555

In The

Supreme Court of the United States

October Term, 1989

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Whether claims for violation of the dormant Commerce Clause are cognizable under 42 U.S.C. §1983, so as to permit an award of attorneys' fees under 42 U.S.C. §1988.

LIST OF PARTIES

Respondents accept Petitioner's designation of parties in the Petition, with the exception of noting that the State of Nebraska was a named party defendant in the proceedings in the trial court, and was an Appellee and Cross-Appellant in the appeal decided by the Supreme Court of Nebraska. (Petition, 1a; 28a; 31a).

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The opinion of the Supreme Court of Nebraska [hereinafter "State Court"], reprinted in Appendix A to the Petition, is reported as *Dennis v. State*, 234 Neb. 427, 451 N.W.2d 676 (1990). The opinion of the District Court of Lancaster County, Nebraska, reprinted in Appendix B to the Petition, is not reported.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents are satisfied with the constitutional provisions and statutes set forth in the Petition.

STATEMENT OF THE CASE

Respondents submit that an adequate and concise statement of the case, including all facts material to the question presented, is provided in the opinion of the State Court. (Petition, 3a-4a).

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Respondents respectfully submit that the Petition should be denied.

I. THE APPLICATION OF 42 U.S.C. § 1983 TO CLAIMS UNDER THE COMMERCE CLAUSE IS NOT A QUESTION AS TO WHICH A GENUINE CONFLICT AMONG THE CIRCUITS EXISTS.

The Petitioner requests the Court to review the State Court's decision that there is no cause of action under 42 U.S.C. § 1983 (1982) for violations of the Commerce Clause. In support of his request, Petitioner asserts there is a conflict among the Circuits and several state supreme courts on the question of whether a claim for violation of the Commerce Clause is cognizable under 42 U.S.C. § 1983. Petition, pp. 8-9. Respondents submit a review of the cases cited by Petitioner reveals the conflict on this issue is not substantial and is not of the type to make this case deserving of further review.

In order to warrant a writ, there must be a "real or 'intolerable' conflict on the same matter of law or fact, and not merely inconsistency in dicta. . . ." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.3 (6th ed. 1986). The conflict relied upon by Petitioner, however, arises principally from a remark made in a footnote to the Third Circuit's opinion in *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980), stating that claims under the Commerce Clause and the Williams Act are actionable under § 1983. There was no considered discussion of the

issue, and, in any event, the remark was dictum, as the injunction sought was sustainable on grounds other than the § 1983 exception to the Anti-Injunction Act, 28 U.S.C. § 2283.

The Sixth Circuit decision in *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982), is similarly devoid of any discussion as to the propriety of a party maintaining a cause of action under § 1983 for violation of the Commerce Clause. The sole reference to the issue is a conclusory remark that the plaintiffs stated claims under § 1983 based on alleged violations of the Supremacy Clause and the Commerce Clause. *Id.* at 562. There is no indication in the Sixth Circuit's opinion that the propriety of this conclusion was either challenged or considered. The federal district court decision from the Sixth Circuit cited by Petitioner, *ANR Pipeline Co. v. Michigan Public Service Commission*, 608 F.Supp. 43, 48 (W.D.Mich. 1984), simply follows the erroneous statement in *Martin-Marietta Corp. v. Bendix Corp.* in finding that § 1983 covers actions brought under the Supremacy Clause and the Commerce Clause.

The Eleventh Circuit decision in *Continental Illinois Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), *vacated as moot*, ___ U.S. ___, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990), is cited by Petitioner as support for the proposition that a Commerce Clause challenge may properly be brought under § 1983, thus permitting an award of attorneys fees under § 1988. This Court vacated and remanded the Circuit Court's decision upon finding the basis for the action had been rendered moot by amendments to the Bank Holding Company Act enacted shortly before the Court of Appeals issued its initial opinion. ___ U.S. at ___,

110 S.Ct. at 1252-53, 108 L.Ed.2d at 408. As a result of the underlying controversy being rendered moot, the Court did not address whether Continental could have been a "prevailing party" in the district court, as required to recover fees under § 1988, and declined to resolve "the related question whether § 1988 fees are available in a Commerce Clause challenge." ___ U.S. at ___, 110 S.Ct. at 1256, 108 L.Ed.2d at 414.

An examination of the Eleventh Circuit's decision, however, reveals no explanation as to what basis the court relied upon to award attorneys fees on appeal, and the Circuit Court's opinion contains no discussion whatsoever on the issue of whether § 1983 is applicable to claims for violation of the Commerce Clause. 838 F.2d at 458.[1] Under these circumstances, it is at best debatable as to whether the decision in *Continental Illinois Corp. v. Lewis* presents a clear and definitive statement of the Eleventh Circuit's position on the question presented by Petitioner. Furthermore, as the *Continental Illinois* case presented questions for review other than the § 1983 issue, it is not clear the Court would have granted the writ in that case if the only question presented had been the applicability of § 1983 to Commerce Clause claims.[2]

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[1] Indeed, it appears Continental suggested the Court of Appeals awarded attorneys fees as a sanction against Lewis under 28 U.S.C. § 1927. Brief for Appellant at 37 n.95, *Lewis v. Continental Bank Corp.*, Dkt. No. 87 – 1955.

[2] In the other case cited by Petitioner, *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297 (D.Mont. 1975), *aff'd on other grounds*, 425 U.S. 463 (1976), an Indian tribe and

(Continued on following page)

In contrast to the foregoing, the decision principally relied upon by the State Court, *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1146-47 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984), exhaustively treated the question presented in light of this Court's determination in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 612-15 (1979), that claims under the Supremacy Clause do not rise to the level of a claim of "right" "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3), the jurisdictional counterpart to § 1983, and the Court's subsequent decisions in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981) and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1, 19 (1981), holding that § 1983 creates a remedy only where the statutory provision on which a claim is

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some of its members challenged a Montana tax partly on Commerce Clause grounds. A three-judge district court found jurisdiction over the tribal claims under 28 U.S.C. § 1362, and, without further analysis, found jurisdiction over the individual claims under 28 U.S.C. § 1343(3) because the "alleged violation of Commerce Clause rights" stated a claim under § 1983. 392 F.Supp. at 1305. This Court affirmed the jurisdictional holdings with regard to the tribal claims under § 1362, but found it unnecessary to determine the correctness of the holding that § 1343(3) provided jurisdiction over the individual claims. In a footnote, however, this Court reminded the lower court that in further proceedings the claims of the individual plaintiffs "must be properly grounded jurisdictionally." 425 U.S. at 468-69 n.7 (citation omitted). It should be noted the lower court's decision predates this Court's decisions in *Chapman v. Houston Welfare Rights Org., infra; Pennhurst State School and Hospital v. Halderman, infra; Middlesex County Sewerage Authority v. National Sea Clammers Ass'n., infra;* and *Golden State Transit Corp. v. City of Los Angeles, infra.*

founded "secures" a "right".[3] Interpreting § 1983 in light of these decisions and the developing jurisprudence under the Commerce Clause, the Eighth Circuit held the Commerce Clause "deals with the relationship between state and national interests, not the protection of individual rights," and thus did not confer a right actionable under § 1983. *Consolidated Freightways*, 730 F.2d at 1144-47.[4]

Since this Court's denial of certiorari in *Consolidated Freightways*, every court which has squarely analyzed and discussed the question presented by Petitioner has held the Commerce Clause does not create "rights, privileges, or immunities secured by the Constitution" enforceable under § 1983. *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Pesticide Public Policy Foundation v. Village of Wauconda*, 622 F.Supp. 423 (N.D. Ill. 1985), *aff'd* 826 F.2d 1068 (7th Cir. 1987); *State of Ga. v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. State*, 221 N.J.Super. 89, 534 A.2d 13 (1987), *aff'd* 111 N.J. 214, 544 A.2d 33 (1988);

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[3] Recently, the Court definitively held that the Supremacy Clause does not, of its own force, create rights enforceable under § 1983. *Golden State Transit Corp. v. City of Los Angeles*, __ U.S. __, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989).

[4] As noted above, this Court denied a petition for certiorari in the *Consolidated Freightways* case. 469 U.S. 834 (1984). The petition for certiorari in that case raised the same issue as the instant petition. Petition for Writ of Certiorari, Dkt. No. 83 - 2119. Nothing has occurred since the Court's denial of certiorari in *Consolidated Freightways* which would compel a different result in this case.

Private Truck Council of America, Inc. v. Secretary of State, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America, Inc. v. State*, 128 N.H. 466, 517 A.2d 1150 (1986). Given the lack of any genuine and clear conflict among either the Circuits or state supreme courts subsequent to the Court's refusal to grant review of this issue in *Consolidated Freightways*, Respondents submit the Court should decline to grant the writ sought by Petitioner.

II. THE STATE COURT'S DECISION IS NOT CONTRARY TO DECISIONS OF THIS COURT INVOLVING THE COMMERCE CLAUSE.

Petitioner also claims the State Court's determination that the Commerce Clause does not secure individual "rights" cognizable under § 1983 is contrary to various decisions of this Court which refer to a "right" to engage in interstate commerce. Petition, pp. 10-11. The following discussion from the Eighth Circuit's decision in *Consolidated Freightways Corp. v. Kassel* effectively refutes Petitioner's assertions:

> It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and state interests, not the protection of individual rights. These decisions are replete with references to the *national* or *federal interest* in preventing the burdensome state regulation of interstate commerce. *See, e.g., Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524, 79 S.Ct. 962, 965, 3 L.Ed.2d 1003 (1959); *Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-42, 69 S.Ct. 657, 664-67, 93 L.Ed. 865 (1949); *Southern Pacific Co. v. Arizona*, 325 U.S. 761,

775-76, 65 S.Ct. 1515, 1523-24, 89 L.Ed. 1915 (1945).

* * *

To support its theory that the Commerce Clause secures rights cognizable under § 1983, Consolidated has cited several Supreme Court cases which refer to a Constitutional "right" to engage in interstate commerce. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967); *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 21, 30 S.Ct. 190, 195, 54 L.Ed. 355 (1910); *Crutcher v. Kentucky*, 141 U.S. 47, 57, 11 S.Ct. 851, 853, 35 L.Ed. 649 (1891). Although these cases do refer to engaging in interstate commerce as a constitutional right, such cases were not dealing with the question of whether the Commerce Clause secures individual rights within the meaning of § 1983. In *Garrity* the reference to interstate commerce was mere dictum, and in both *Western Union* and *Crutcher*, the focus of the Court's opinions was on the separation of powers between the national and state legislatures. Despite these references to a right to engage in interstate commerce, we agree with the district court that the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy. *See generally Hood & Sons, Inc.*, 336 U.S. at 537-39, 69 S.Ct. at 664-66.

Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of § 1983.

730 F.2d at 1144-45 (footnotes omitted).

Indeed, the plain meaning of the statutory language employed in § 1983 precludes the conclusion that a claim of violation of the Commerce Clause is actionable under § 1983. A claim that state action violates the dormant Commerce Clause does not state a claim for "the deprivation of any rights, privileges, or immunities secured by the Constitution . . . to any citizen or other person" as required by § 1983. The language of the Commerce Clause makes no reference to any right, privilege, or immunity secured to citizens or persons. Rather, the Commerce Clause deals specifically with a *power* granted to Congress, stating: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ." U.S.Const., Art. I, sec. 8, cl. 3.[5]

Thus, the Commerce Clause vests the national government with the plenary "power" to regulate interstate commerce. The Court has not enforced the Commerce Clause as an individual constitutional right granted to individual market participants, but rather as a means to allocate power between the state and federal governments to protect and preserve the national economy. *See, e.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949) (purpose of Commerce Clause is to promote competition and the free flow of commerce so as to prevent "economic isolation" and ensure that "our economic unit is the Nation."). While individuals possess the ability to

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[5] A leading authority has identified four separate classes of legal entitlements: "rights," "privileges," "immunities," and "powers." Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 Yale L.J. 16 (1913). Significantly, § 1983 contains reference only to the first three of these entitlements.

bring suit to enforce the supreme power of the federal government over matters relating to interstate commerce, the ability of an individual to sue as an incidental or indirect beneficiary of the federal "power" over interstate commerce is not a constitutional "right" protected by § 1983.

This is consistent with the decision of the State Court, adopting the Eighth Circuit's view in *Consolidated Freightways Corp. v. Kassel*, that "the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy." 730 F.2d at 1145. Furthermore, as explained by one commentator, the fact that the Court has, on occasion, made general references to a "right" to engage in interstate commerce, does not establish the existence of a constitutional "right" within the meaning of § 1983:

> [T]he Court sometimes has referred to a 'right' to engage in interstate commerce free of state impediments. In addition, modern dormant commerce clause analysis focuses primarily on the antiprotectionist and nondiscrimination principles that the clause embraces. But judicial enforcement of such constitutional limits on state government at the behest of private parties no more secures an individual right for the purposes of § 1983 than it does in the context of the supremacy clause, or other provisions that allocate power between the states and federal government. And although it is true that federalism limitations protect individual freedoms, the right here is not one to be free of discriminatory legislation, but to be free of it in the absence of a congressional mandate.

Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo.L.J. 1493, 1550 (1989) (footnotes omitted).

In sum, when taken in proper context, the asserted inconsistency between the decision of the State Court and statements contained in decisions of this Court as to the scope of the Commerce Clause does not, in reality, exist. Accordingly, the Court should decline to grant the writ.

III. THE APPLICATION OF § 1983 TO COMMERCE CLAUSE CLAIMS DOES NOT PRESENT AN IMPORTANT QUESTION NECESSITATING REVIEW.

Finally, Petitioner asserts the application of § 1983 to claims under the Commerce Clause is "extremely important to the effective enforcement" of the Clause. Petition, p. 12. An analysis of the nature and long history of Commerce Clause litigation, however, reveals this assertion is unwarranted. Furthermore, Respondents submit the expansion of § 1983 into the realm of Commerce Clause litigation is not only unnecessary to ensure the effective enforcement of the Clause, but would also be extremely detrimental to state interests.

Commerce Clause claims, unlike claims brought to redress violations of individual constitutional rights, are economic in nature and involve disputes between business interests and government over taxes and other regulatory legislation. From a historical perspective, it was not until four years after § 1983 was enacted that private parties began to litigate Commerce Clause cases in federal court. Act of March 3, 1875, § 1, 18 Stat. 470 (creating

federal question jurisdiction) (codified as amended at 28 U.S.C. § 1331). Previously, dormant Commerce Clause claims were brought in state court. Following enactment of the federal question statute in 1875, actions involving dormant Commerce Clause claims brought in federal court were based on federal question jurisdiction, not § 1983 and its jurisdictional counterpart. Collins, *supra*, 77 Geo.L.J. at 1507-33; 1551. Even after the creation of federal question jurisdiction, numerous Commerce Clause cases have been brought in state court, including the instant case, subject to the possibility of review in this Court. *E.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 529.

Thus, private litigants have historically possessed sufficient opportunities and incentives to litigate Commerce Clause claims without resort to § 1983. The only reason to bring such a claim under the civil rights legislation is to enhance the opportunity to recover damage awards and to secure attorneys' fees under § 1988. There is no reason to believe Congress intended to embrace claims under the Commerce Clause within the coverage of § 1983. Long before the progenitor of § 1983 was enacted in 1871, private litigants had resort to the courts to assert claims that state actions violated the Commerce Clause. *See, e.g., Passenger Cases* (*Norris v. City of Boston*), 48 U.S. 122, 139, 7 How. 283, ___ (1848); *cf. Brown v. Maryland*, 25 U.S. 262, 12 Wheat. 419 (1827). There was no need for Congress to create an additional remedy for such claims in the 1871 Civil Rights Act. It is also unlikely that Congress, in enacting 42 U.S.C. § 1988, "[t]he purpose of

[which] is to ensure 'effective access to the judicial process,' " *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), intended to reverse the traditional American rule against fee shifting for cases which historically had "effective access" to the courts.

Furthermore, as a matter of policy, attorneys' fees awards are neither necessary nor desirable in dormant Commerce Clause litigation. Business interests challenging discriminatory state regulation (unlike individuals seeking redress for violations of personal rights guaranteed by the Constitution) do not need the economic incentive of attorneys' fees to prosecute Commerce Clause claims. The imposition of damage awards and attorneys' fees in Commerce Clause litigation would impose a serious financial burden on state officials and would undoubtedly have a chilling effect on their willingness to engage in legitimate and needed activities in areas such as taxation and the regulation of business activity. Collins, *supra*, 77 Geo. L.J. at 1562. The purpose of § 1983, to provide a means to redress violations of individual civil liberties guaranteed by the Constitution, is not promoted by allowing resort to its provisions as a means to further purely economic interests. The extension of § 1983 into the realm of Commerce Clause litigation is unwarranted both as a matter of law and as a matter of policy.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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